

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

R. V. ASSOCIATES

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No. 88-28

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This is an appeal of Notices and Orders of Civil Penalty issued by Puget Sound Air Pollution Control Agency ("PSAPCA") to R. V. Associates for alleged violations of air pollution control regulations concerning asbestos removal and disposal. A formal hearing was held on October 31, 1987 and on November 3, 1988 in Lacey, Washington. Board Members Judith A. Bendor (Presiding) and Harold S. Zimmerman, were present. Appellant R.V. Associates was represented by Attorney William H. Broughton of Merkel, Caine & Donohue (Seattle). Respondent PSAPCA was represented by Attorney Keith D. McGoffin of McGoffin &

1 McGoffin (Tacoma). The proceedings were recorded by reporters with
2 Gene Barker & Associates.

3 Opening statements were made. Witnesses were sworn and
4 testified. Exhibits were admitted and examined. Closing briefs were
5 filed on December 7 and 9, 1989. From the testimony, exhibits and
6 contentions of the parties, the Board makes these

7 FINDINGS OF FACT

8 I

9 PSAPCA is an activated air pollution control authority pursuant
10 to State of Washington Clean Air Act, Chpt. 70.94 RCW. It is
11 responsible for monitoring and enforcing emission standards for
12 hazardous air pollutants, including work practices for asbestos.
13 PSAPCA has filed with the Board certified copies of its Regulation I
14 (including all amendments thereto).

15 The Board takes official notice of the Regulation (as amended).

16 II

17 MHRV, Inc., an Oregon corporation and developer of mobile home
18 parks, contracted with R.V. Associates a general contractor, to build
19 a 50-acre mobile home site along Central Valley Road, in Bremerton,
20 Washington. The contract with R.V. Associates covered mass
21 excavations, installation of on-site utilities, and road building.
22 Later, R.V. agreed to also install 18" ductal iron water mains along
23 Central Valley Road from a pump station near McWilliams Road, north a
24

1 mile to the intersection of Central Valley Road and Fairgrounds Road.
2 Blueprints provided indicated that R.V. Associates should have been
3 able to stay 4-5 feet away from any existing water line. R.V. had no
4 certified asbestos workers working on this project at any time.

5 As soon as R.V. Associate's crews began installing the 18" main,
6 they encountered an 8" water line. They immediately shut down the
7 project and informed MHRV, Inc. of the alignment problem. R.V.
8 Associates contacted the City of Bremerton. They met with all parties
9 and the City told R.V. Associates a water line would be installed to
10 serve the homes. R.V. Associates agreed to remove the 8" water line
11 if they came upon it while installing the 18" line. The City did not
12 inform R.V. about any special requirements for removing the 8" pipe,
13 nor is there evidence that R.V. Associates knew the 8" line was
14 asbestos pipe.

15 When R.V. workers came upon the 8" pipe, they partially removed
16 it, and in some instances re-buried it. However, as later inspections
17 revealed, some of the pipe was left exposed, some had been broken or
18 crushed, and pipe debris was found several feet away from the pipe's
19 original alignment.
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III

The Civil Penalties at issue in this are:

Alleged Date of Incident and Inspection Area	Notice of of Violation	Orders of Civil Penalty	Amount	Alleged Violation
Feb. 23, 1988 (Both sides of CV Road, 9/10 mile each side)	24576 24577 24578	#6809	\$1,000	WAC 173-400; Reg. I-Secs. 10.03(a); 10.04(b)(1); 10.04(b)(2) (iii) A, B and C.
Feb. 25, 1988 (CV between Holland and Fairgrounds Road)	24579 24580 24581	#6810	\$1,000	(Same as above)
March 2, 1988 (CV North of Holland Road)	24582 24583 24584	#6811	\$1,000	Reg. I-Secs. 10.03(a)and 10.04(b)(1)
March 18, 1988 (Both sides of CV Road, 9/10 mile each side)	24586 24587 24588	#6813	\$1,000	(Same as 2/23/88)
March 18, 1988 (Both sides of CV Road, 9/10 mile each side)	24585	#6812	\$1,000	Reg. I-Secs. 10.04(b)(2) (iii) A, B and C.
May 3, 1988 (West side CV Road near Holland Road)	24593	#6835	\$1,000	Reg. I-Secs. 10.04(b)(2) (iii) A, B and C.
June 9, 1988 (Both sides CV Road, 9/10 mile each side)	25202	#6859	\$1,000	(Same as 5/3/88)
June 29, 1988 (Both sides CV Road: 9/10 mile each side)	25205	#6869	\$1,000	(Same as 5/3/88)

CV = Central Valley Road

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1 The areas inspected covered different lengths along Central Valley
2 Road, from McWilliams Road to Fairgrounds Road, as the preceding chart
3 shows. Woodland Elementary School and Evangelical Baptist Church are
4 located within that area. All alleged asbestos debris found by
5 PSAPCA, except for one sample, was found on the west side of Central
6 Valley Road. The attached map shows where some of the samples were
7 taken. (Exh. R-46)

8 IV

9 The first PSAPCA inspection occurred on February 23, 1988 in
10 response to a complaint. The inspectors found broken pieces of pipe
11 littered along the west shoulder of Central Valley Road for 9/10 of a
12 mile. The pipe was in varying condition, some pieces had been driven
13 over, and many pieces were broken. There were children's footprints
14 nearby along the road shoulder. The inspector was able to break small
15 pieces of the pipe by finger pressure. The inspector talked with two
16 employees of R.V. Associates who said that one pipe had been dug up by
17 R.V. Associates.

18 Two samples and photographs were taken. The inspector took the
19 samples to the Department of Ecology Manchester Laboratory. Test
20 results later revealed the material to be 50% and 80% asbestos.

21 V

22 The inspector called R.V. Associates at about 1:15 p.m. and told
23 them about the problem. The R.V. contract supervisor said that an
24 existing water pipe had been excavated, broken up and reburied.

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1 R.V. Associates said it would arrange to have the area cleaned up. As
2 a result of the inspection and laboratory analysis, Order of Civil
3 Penalty No. 6809 was issued (\$1,000). R.V. people moved a few larger
4 pieces of the pipe to another location that evening. No on-site
5 cleanup by certified workers was even attempted until two days later,
6 on February 25, 1989, after R.V. hired AA&E, a licensed asbestos
7 removal firm. (During the ensuing three weeks AA&E removed some of
8 the 8" pipe, covered portions of pipe, and hydro-seeded the road
9 shoulder to encourage plant growth and to prevent erosion.)

10 VI

11 On February 25, 1988 at about 11:00 a.m., the PSAPCA inspector
12 returned to the area, because he had heard through the Department of
13 Ecology that the area had been reportedly cleaned up. The inspector
14 saw a large amount of pipe debris consisting of mostly smaller pieces
15 of what appeared to be asbestos, along the west side of Central Valley
16 Road. He collected two samples of the debris and placed them in
17 plastic bags for analysis. Later, laboratory analysis showed the
18 samples to be 80% asbestos. He called the R.V. supervisor at about
19 1:00 p.m. that day. R.V. informed the inspector that a contractor had
20 been hired to remove the asbestos. At this point no Notice of Intent
21 to Remove had yet been filed with PSAPCA.

22 At about 3:30 p.m.. someone from AA & E General Contractors
23 called PSAPCA and spoke with the inspector about the asbestos
24 removal. The inspector informed the caller of the need to file the
25

1 Notice with PSAPCA, and informed them that this was an emergency
2 removal operation. At about 4:15 p.m. the inspector spoke with the
3 R.V. supervisor and his attorney, informing them that notices of
4 violation would issue as a result of that day's inspection, and
5 expressing concern about continued contamination and public exposure.
6 PSAPCA subsequently issued Civil Penalty No. 6810 (\$1,000).
7

8 VII

9 On March 2, 1988, the inspector returned to the area and took
10 samples and photographs of suspected asbestos pipe segments. These
11 pieces were small, very broken up, approximately one inch by one
12 inch. The pieces which were dry and friable appeared to have become
13 exposed due to erosion. The pieces were from one to four feet from
14 the road. The inspection only covered a few hundred feet of the
15 Central Valley Road, not the 9/10 mile length. Laboratory analysis
16 later revealed 85% asbestos. The next morning, March 3, 1988, the
17 inspector left a message for the R.V. Associates supervisor, and
18 Notices of Violation were also sent that day. Civil Penalty No. 6811
19 was subsequently issued (\$1,000).
20

21 VIII

22 The next inspection occurred more than two weeks later. On March
23 18, 1988, the inspector took photographs near the driveway of the
24 Evangelical Baptist Church and near the Woodlands Elementary School.
25 One photograph showed footprints near suspected asbestos and
indications that heavy machinery had disturbed the site. The other

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1 photograph showed pieces that had apparently been overlooked in
2 previous cleanups, rather than recently exposed. A total of about two
3 handfuls of asbestos were seen. Samples were taken, and subsequent
4 analysis showed 80% asbestos. The inspector contacted the R.V.
5 Associates supervisor and the sub-contractor that morning, and
6 informed them that more asbestos had been found and Notices of
7 Violation would issue. PSAPCA subsequently issued Civil Penalties
8 Nos. 6813 and 6812 (\$2,000).

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10 IX

11 The inspection on May 3, 1988 took place after heavy rain.
12 Pieces of suspected asbestos pipe fragments were found south of
13 Woodland Elementary School driveway and a sample was taken. It was
14 dry and friable. The inspector called his office and had them inform
15 R.V. that Notices of Violation would issue. Subsequent laboratory
16 analysis revealed 75% asbestos. Civil Penalty No. 6835 (\$1,000) was
17 issued.

18 X

19 The inspector returned to the area on June 9, 1988, and checked
20 both sides of Central Valley Road. He found large amounts of
21 suspected asbestos pipe, almost as much as seen on February 25, 1988.
22 All the pieces were dry and friable. He took four photographs and
23 three samples. He notified the R.V. Associates supervisor that day
24 and said that Notices of Violation would be issued and would continue

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1 to be issued for each day that asbestos-containing pipe debris was
2 found in this area. Subsequent analysis showed 80% asbestos. Civil
3 Penalty No. 6859 (\$1,000) was issued.

4 XI

5 The final inspection took place on June 29, 1988. The entire area
6 was walked. Most of the larger pieces seen the previous time were
7 gone. A few smaller pieces 4" to 5" long were seen. Two photographs
8 and samples were taken. The samples were dry, but not friable (i.e.
9 couldn't be broken with finger pressure). The inspector called his
10 office and had them inform R.V. Associates that Notices of Violation
11 would issue. Analysis showed asbestos content of 75%. Civil Penalty
12 No. 6869 (\$1,000) was issued.

13 XII

14 AA&E filed Notices of Intent to Remove Asbestos on February 29,
15 1988 and March 7, 1988. The February 29 Notice recited February 26,
16 1988 as the removal starting date. The March 7, 1988 Notice recited
17 March 2, 1988 as the removal starting date.

18 XIII

19 For all alledged violations R.V. Associates was notified no later
20 than the very next day that an alleged violation had occurred. We
21 find that on each day in question, when exposed, broken asbestos
22 material was found, that more probably than not it was appellant's
23 actions which caused or allowed asbestos pipe material to be removed
24 from burial in the ground, to be broken or crushed and to remain
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1 exposed. PSAPCA sustained its burden in this regard. Appellant's
2 mere argument that someone else might have caused the problems does
3 not constitute factual rebuttal.

4 XIV

5 R.V. Associates contracted with AA&E for \$8,000 to clean up the
6 debris along both sides of the 9/10 mile length of road. (This figure
7 did not include trucking and flagging costs.) R.V. subsequently paid
8 \$3,500 for additional paving. There were additional unreimbursed
9 costs to R.V. Associates, an estimated \$35,000 "cash out of pocket".

10 XV

11 Asbestos transite pipe when intact does not release fibers into
12 the air. However, when the pipe is broken, crushed or cut, it has the
13 potential to release fibers into the air. Appellant's evidence
14 regarding cutting is not persuasive.

15 XVI

16 Any Conclusion of Law deemed to be a Finding of Fact is hereby
17 adopted as such. From these Findings of Fact, the Board makes these

18 CONCLUSIONS OF LAW

19 I

20 The Board has jurisdiction over the subject matter and the
21 parties. Chapter 43.21B RCW. The case arises under regulations
22 implementing the Washington Clean Air Act, Chapter 70.94 RCW.
23 PSAPCA has the burden of proof.

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II

Asbestos is a substance which has been specifically recognized for its hazardous properties. It is classified pursuant to Section 112 of the Federal Clean Air Act for the application of National Emission Standards for Hazardous Air Pollutants (NESHAPS). It is a substance which, by Federal Clean Air Act definition:

causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitation reversible illness.

III

The federal asbestos handling regulations have been adopted by the Washington State Department of Ecology. WAC 173-400-075(1). PSAPCA has adopted its own regulations on removal of asbestos, designed to meet or exceed the requirements of the federal/state regulations. PSAPCA Regulation I, Article 10.

PSAPCA's Regulation I, Article 10 recognizes the danger:

The Board of Directors of the Puget Sound Air Pollution Control Agency recognize that asbestos is a serious health hazard. Any asbestos fibers released into the air can be inhaled and can cause lung cancer, pleural mesothelioma, peritoneal mesothelioma or asbestosis. The Board has, therefore, determined that any asbestos emitted to the ambient air is air pollution.

By virtue of Article 10 as a whole, PSAPCA has, in effect, found as a legislative fact that, unless asbestos is properly handled throughout its removal and disposal, there is an unacceptable risk asbestos

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1 fibers may escape to the ambient outdoor air. It is entirely
2 consistent with the statutory purpose of air pollution prevention to
3 regulate activities, whether indoors or out, which bear directly on
4 minimizing the risk. Reasonable consistency with statutory purposes
5 is all that is required of regulations. See, e.g., Weyerhaeuser v.
6 Department of Ecology, 86 Wn.2d 310, 545 P.2d 5 (1976). PSAPCA's
7 asbestos regulations meet that test. Alpine Builders, Inc. and Tacoma
8 School District No. 10 v. PSAPCA, PCHB Nos. 86-183 and 86-192 (1987).
9

10 IV

11 The relevant portions of regulations at issue in this case are:

12 SECTION 10.02 DEFINITIONS

13 [. . .]

14 (a) "Adequately wetted" means sufficiently mixed
15 or coated with water or an aqueous solution to
16 prevent dust emissions.

17 (b) "Asbestos" means the asbestiform varieties
18 of serpentinite (chrysotile), riebeckite
19 (crocidolite), cummingtonite-grunerite, anthophyllite,
20 and actinolite-tremolite.

21 [. . .]

22 (e) "Asbestos material" means any material
23 containing at least one percent (1%) asbestos as
24 determined by polarized light microscopy using the
25 Interim Method of the Determination of Asbestos in
26 Bulk Insulation samples contained in Appendix A of
27 Subpart F in 40 CFR Part 763, unless it can be
demonstrated that the material does not release
asbestos fibers when broken, crumbled, pulverized or
otherwise disturbed.

(f) "Asbestos project" means the construction,
demolition, repair, maintenance, or renovation of any
public or private building or mechanical piping
equipment or systems involving the demolition,
removal, encapsulation, salvage, or disposal of the
material releasing, or likely to release, asbestos
fibers into the air.

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1 (g) "Asbestos removal" means to take out or
2 strip off asbestos materials.

3 [. . .]

4 (k) "Emergency removal operation" means an
5 asbestos removal operation that was not planned but
6 results from a sudden, unexpected event. This term
7 includes removal operations necessitated by failures
8 of equipment, identification of additional asbestos
9 materials during the course of a removal or a removal
10 necessary to abate an imminent health hazard.

11 [. . .]

12 SECTION 10.03 NOTIFICATION REQUIREMENTS AND FEES

13 (a) It shall be unlawful for any person to cause
14 or allow the removal or encapsulation of asbestos
15 materials or to work on an asbestos project from any
16 structure, installation, vessel or building unless
17 the owner or person conducting an asbestos removal or
18 encapsulation operation has filed with the Control
19 officer written notice of intention to remove or
20 encapsulate asbestos.

21 (1) If the amount of asbestos material to be
22 removed is at least 303 linear meters (1000
23 linear feet) on pipes or at least 460 square
24 meters (5000 square feet) on other components, the
25 notice required by Subsection 10.03(a) shall be
received by the Control Officer at least 10 days
before removal begins, accompanied by a \$500
notification fee.

26 (2) If the amount of asbestos material to be
27 removed is at least 80 linear meters (260 linear
feet) on pipes or at least 15 square meters (160
square feet) on other components, but less than
303 linear meters (1000 linear feet) on pipes or
460 square meters (5000 square feet) on other
components, the notice required by Subsection
10.03(a) shall be received by the Control Officer
at least 10 days before removal begins,
accompanied by a \$250 notification fee.

(3) If the amount of asbestos material to be
removed is less than 80 linear meters (260 linear
feet) on pipes or 15 square meters (160 square
feet) on other components but at least 3 linear
meters (10 linear feet) on pipes or 1 square
meter (11 square feet) on other components, the
notice required by Subsection 10.03(a) shall be
received by the Control Officer at least 20 days
before removal begins, accompanied by a \$100
notification fee.

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(13)

[. . .]

(e) The Control Officer may waive the notification period of ten (10) days contained in Subsections 10.03(a)(1), and (2), or twenty (20) days contained in Subsection 10.03(a)(3) based on a showing that the asbestos removal is an emergency removal operation.

[. . .]

SECTION 10.04 PROCEDURES FOR ASBESTOS CONTROL

[. . .]

(b) It shall be unlawful for any person to cause or allow the removal or encapsulation of asbestos material or to work on an asbestos project unless:

- (1) The removal or encapsulation is conducted by a certified asbestos worker; and
- (2) The following procedures are employed:

[. . .]

(iii) Asbestos materials that have been removed or stripped shall be:

(A) Adequately wetted to ensure that they remain wet until they are collected for disposal; and

(B) Collected for disposal at the end of each working day; and

(C) Contained in a controlled area at all times until transported to a waste disposal site; and

V

The Washington Clean Air Act is a strict liability statute. Acts violating its implementing regulations are not excused on the basis of absence of intent. See, RCW 70.94.040, RCW 70.94.431; Industrial Maintenance and Construction, Inc. v. PSAPCA, PCHB No. 87-179 (October 1988). R.V. Associates, a general contractor, therefore, cannot rely on lack of intention or knowledge to relieve them of liability. Any diligence is weighed against the amount of the fine, rather than negating basic liability. Industrial, supra.

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Because asbestos is inherently dangerous, the duty to comply with asbestos handling requirements is treated as non-delegable.

Accordingly, we have held in asbestos cases a party cannot relieve itself of responsibility by contract. Federal Way School District #210 v. PSAPCA, PCHB No. 86-164 (January 28, 1987); See, Sea Farms, Inc. v. Foster & Marshall Realty, 42 Wn.App. 308, 711 P.2d 1049 (1985). We adhere to this approach in the instant case.

VI

We conclude that the Notices and Orders of Civil Penalty were of sufficient particularity to provide appellant adequate notice of Regulation I, Article 10 violations. The Notices and Orders recited the date and location of the violations, and recited the specific sections alleged to be violated. In addition, during the five-month pendency of this appeal, R.V. Associates had available the full range of civil discovery to further clarify the legal contours. Chpt. 371-08 WAC. Appellant failed to avail itself of these litigation tools. It cannot be now heard to complain. Savage Enterprises, Inc. v. PSAPCA, PCHB No. 87-164 (March 1988); See, Marysville v. PSAPCA, 104 Wn.2d 115, 702 P.2d 469 (1985).

VII

We conclude that on each day in question, pieces of asbestos transite pipe that were analyzed were in fact "asbestos material" under Regulation I, Section 10.02(c) definition. In so concluding, we

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1 observe that it is appellant's burden to prove that the material did
2 not release fibers when broken, crushed, pulverized or disturbed.
3 Appellant has failed to so prove.

4 VIII

5 We conclude that R.V.'s actions constituted working on an
6 "asbestos project" as defined by Regulation I, Section 10.02(f).

7 IX

8 We conclude that on or before February 23, 1988, R.V. failed to
9 file a Notice of Intent for their work on an asbestos project in
10 violation of Section 10.03(a). We conclude that this 10.03(a)
11 violation was also proven for February 25, March 2, and March 18, 1988
12 (#6813), as no notice was filed in advance of that work. The Notices
13 filed by AA&E on February 26 and March 7, 1988 were late, after the
14 work began. (See Finding of Fact XII, above.) R.V. cannot delegate
15 to a sub-contractor the duty to ensure the Notices are filed and
16 thereby remove itself from responsibility. Nor did the earlier
17 declaration of emergency negate the Notice requirement; it merely
18 modified the requirement that the Notice be filed 10 or 20 days in
19 advance of work. Section 10.03(e).

20 X

21 A violation of Regulation I, Section 10.04(b)(1) did occur on or
22 before February 23, 1988, prior to the inspection, when R.V. workers
23

1 who were not certified, removed or allowed the removal of asbestos
2 pipe which was broken or crushed (Order #6809). A violation of
3 10.04(b)(1) also occurred on the evening of February 23, 1988 when
4 uncertified R.V. personnel removed several large pieces of broken pipe
5 (#6810). However, no violation of 10.04(b)(1) has been demonstrated
6 for March 2, 1988 (#6811).

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8 XI

9 We conclude that violations of Regulation I, Sections
10 10.04(b)(2)(iii) were proven for on or before: February 23, 1988
11 (#6809), February 25, 1988 (#6810), March 18, 1988 (#6813 and #6812),
12 May 3, 1988 (#6835), June 9, 1988 (#6859), and June 29, 1988 (#6869).

13 XII

14 In sum, at least one violation of PSAPCA Regulation I has been
15 found for each Order of Civil Penalty issued.

16 Because we so conclude, we do not address whether violations of
17 WAC 173-400 also occurred.

18 XIII

19 The purpose of civil penalties is to promote compliance with the
20 law. Savage, supra. Here the violations proven were extensive
21 geographically and extended over almost four months in time.
22 Appellant's efforts to ensure a lawful cleanup were repeatedly
23 inadequate. We therefore conclude under all the facts and
24 circumstances that the penalties were appropriate, except that

1 Penalties Nos. 6812 and 6813 were issued for the same day and merit
2 some mitigation.

3 X IV

4 Any Finding of Fact deemed to a Conclusion of Law is hereby
5 adopted as such. From these Conclusions of Law, the Board enters this
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ORDER

Notices and Orders of Civil Penalty Nos. 6809, 6810, 6811, 6812, 6813, 6835, 6859 and 6869 are AFFIRMED in full for \$8,000, except that No. 6813 (\$1,000) is SUSPENDED, provided that during the next two years appellant does not violate in the State of Washington any air pollution laws or regulations.

DONE this 17th day of March, 1989.

POLLUTION CONTROL HEARINGS BOARD


JUDITH A. BENDOR, Presiding


HAROLD S. ZIMMERMAN, Member

Attch: Exh. R-46 (Map)

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(19)

14

Fairground Rd

PN

E

6-9-88 #9 #10

MM

5-3-88

3-2-88

#2 3-19-88

2-23-88

2-23-88

Moreland Elementary

Highway

Holland Rd

6-9-88 #11

6-9-88

Evangel
Baptist
Church

4-6-88

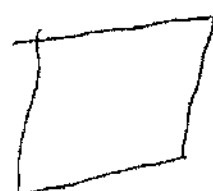
#1 3-19-88

6-29-88

Caney Valley Rd

MHRV

2-23-88



Pump Station

McWilliams Rd

R-46